IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 997 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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SAIYED ANWAR MAMAD SHAH - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR SHAKEEL A QURESHI for Applicant(s) : 1,
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR.HIREN M MODI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 28/09/2007

ORAL JUDGMENT

Rule. Mr.M.R.Mengdey, learned APP waives service of rule on behalf of respondent No.1. Mr.Hiren Modi, learned Advocate waives service of rule on behalf

of respondent No.2.

2. By way of this application under Article 227 of the Constitution of India, the petitioner – husband has prayed for an appropriate Writ, direction and order to quash and set aside the judgment and order dated 7th April, 2006 passed by the learned 2nd Additional Senior Civil Judge & JMFC, Bhuj in Criminal Misc. Application No.260 of 2004 whereby the learned Judge awarded maintenance of Rs.1000/- against the petitioner. It is further prayed to quash the order dated 5th May, 2007 passed by the learned Sessions Judge, Kachchh – Bhuj passed in Criminal Revision Application No.43 of 2006, whereby the learned Sessions Judge has enhanced the maintenance amount of Rs.2000/-.

3. Respondent No.2 – herein original applicant submitted Criminal Misc. Application No.260 of 2004 under Section 125 of the Criminal Procedure Code for getting maintenance before the learned 2nd Additional Senior Civil Judge & JMFC, Bhuj claiming maintenance of Rs.5000/- per month from the petitioner – husband and the learned trial Court vide order dated 07.04.2006 allowed the said application awarding maintenance to respondent No.2 at the rate of Rs.1000/- per month with effect from 03.08.2004. Being aggrieved and dissatisfied with the

order passed by the learned trial Court dated 07.04.2006 in awarding maintenance at the rate of Rs.1000/- per month only, respondent No.2 – herein preferred Criminal Revision Application No.43 of 2006 before the learned Additional Sessions Judge, Kachchh at Bhuj and the learned Additional Sessions Judge, Bhuj by his impugned judgment dated 05.05.2007 allowed the said Revision Application and modified the order passed by the learned trial Court and ordered to pay respondent No.2, Rs.2000/- per month by way of maintenance under Section 125 of the Cr.P.C. with effect from the date of original application i.e. 03.08.2004. Being aggrieved and dissatisfied with the same, the petitioner preferred the present petition under Article 227 of the Constitution of India.

4. At the outset, it is required to be noted that so far as the original order passed by the learned 2nd Additional Senior Civil Judge & JMFC, Bhuj dated 07.04.2006 awarding maintenance to respondent No.2 at the rate of Rs.1000/- from the petitioner is concerned, the petitioner never challenged the same before the Revisional court and therefore, it is not open for the petitioner to challenge the said order in the present petition and therefore, the prayer of the petitioner to quash and set aside the judgment and order dated

07.04.2006 passed by the learned trial Court in Criminal Misc. Application No. 260 of 2004 is hereby rejected. Therefore, in the present proceedings prayer of the petitioner to quash and set aside the judgment and order passed by the learned Revisional Court dated 05.05.2007 in Criminal Revision Application No.43 of 2006 enhancing the amount of maintenance of Rs.2000/- is required to be considered. Mr.Qureshi, learned Advocate appearing on behalf of the petitioner has vehemently submitted that the impugned judgment and order passed by the learned Revisional Court enhancing the amount of maintenance to Rs.2000/- is ex-parte order and the same is passed without giving opportunity to the petitioner. It is submitted that on 04.01.2007 the learned Sessions Judge has ordered that the revision proceedings preferred by respondent No.2 would be conducted ex-parte and it appears that on 04.04.2007 the petitioner engaged an Advocate. Therefore, the Advocate of the petitioner gave an application for adjournment to enable him to get some documents. The said application came to be rejected on 04.04.2007. It appears from the Roznama that the matter was kept for hearing. Thereafter, the learned Judge was not available and the matter was fixed for hearing on 11.05.2007. However, surprisingly on 05.05.2007, behind the back of the petitioner and his advocate, judgment has

been delivered by enhancing maintenance amount from Rs.1000/- to Rs.2000/-. Therefore, it is submitted that impugned order passed was ex-parte and without giving opportunity to the petitioner and same requires to be quashed and set aside. Mr.Qureshi, learned Advocate appearing on behalf of the petitioner has also made statement at the Bar that if the matter is remanded to the learned Revisional Court on condition that the petitioner shall clear all the arrears within a stipulated time and on that condition only impugned order may be set aside and the matter be remanded to the learned Revisional court and; that if the arrears are not cleared within stipulated time that may be passed fixed by this Court, the order passed by the learned Revisional Court may be restored.

5. Mr.Modi, learned Advocate appearing on behalf of respondent No.2 has tried to submit that the order passed by the learned Revisional Court was not ex-parte order. However, as the petitioner did not appear therefore, the learned trial Court passed an order to proceed further with the Revision Application ex-parte. However, looking to the Rojkam, it appears that the learned Revisional Court has passed the order in haste and one opportunity ought to have been given to the

petitioner to submit his case rather than rejecting the application dated 04.04.2007.

6. Considering the fact that impugned order has been passed by the learned Revisional Court ex-parte and the same is without giving opportunity to the petitioner; without further entering into the controversy whether the learned trial Court was justified in proceedings further ex-parte or out, it appears to the Court that the learned Revisional Court ought to have given one opportunity to the petitioner to submit his case on merits rather than rejecting the application dated 04.04.2007.

7. Under the circumstances, judgment and order dated 05.05.2007 passed by the learned Additional Sessions Judge, Kachchh at Bhuj in Criminal Revision Application No.43 of 2006 is hereby quashed and set aside and the matter is remanded to the learned Revisional Court for deciding the same afresh in accordance with law and on merits after giving opportunity to the petitioner and respondent No.2, on condition that the petitioner shall clear the entire arrears as per the order passed by the learned trial Court within a period of 6(six) weeks from today. As agreed by the learned Advocate appearing on behalf of the petitioner if the arrears are not

cleared within a stipulated time as stated above, the learned Judge will not decide the Revision Application on remand and the judgment and order passed by the learned Sessions Judge, Bhuj in Criminal Revision Application No.43 of 2006 which is quashed and set aside by this Court is to be treated as restored and the petitioner to comply with the order. Rule is made absolute to the aforesaid extent.

[M.R.Shah, J.]

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